

REMARKS

The foregoing amendment is submitted to address both the technical objections to the claims and the rejection of the claims based on prior art. Claim 1 of the application is amended to refer to a hard boiled candy composition which includes a confectionery base as described, at least one botanical, and a specified amount of one or more partially hydrogenated vegetable oils or saturated fats. The claim has been specifically amended to provide that the "at least one botanical" is selected from those specific botanicals identified in claim 2 which has now been cancelled. Each of these specific botanicals (e.g. Echinacea) is indicated as having an unpleasant mouthfeel. Claim 1 has also been amended to provide that the amount of the one or more partially hydrogenated vegetable oils or saturated fats is based on the weight of the hard boiled candy composition.

Claim 4 has been amended to separate the partially hydrogenated vegetable oils from the saturated fats. Accordingly, claim 4 refers to only partially hydrogenated vegetable oils while new claim 56 refers specifically to the saturated fats.

Claims 6 and 7 have been amended to make it clear that the amount of the partially hydrogenated vegetable oil or saturated fat is based on the weight of the hard boiled candy composition.

Method claim 28 has been amended in a manner similar to claim 1. Claim 31 has been amended to limit the stated materials to hydrogenated vegetable oils and new claim 57 sets forth the preferred saturated fats similar to new claim 56.

In addition, claim 55, directed to a hard boiled candy composition “consisting essentially of” has been amended in a manner similar to claim 1. The remaining changes to the claims are to correct minor errors appearing therein.

It is respectfully submitted that the amendments made to the claims are fully supported in the application as filed and entry thereof is deemed proper and is respectfully requested.

Claims 1-9, 28-36, and 55 stand rejected as being indefinite for use of the term “unpleasant mouthfeel.” The Office Action states that this is an indeterminate term as it is a subjective description that may vary from one person to another, thus rendering the claims indefinite. The Office Action specifically states by way of example that a food or flavor that might have an unpleasant mouthfeel for some, may have a mouthfeel desirable for others. This ground of rejection is respectfully traversed.

As indicated above, the claims of the application have been limited to a specific group of botanicals. One of ordinary skill in the art knows the characteristics of each of these botanicals and the extent they elicit a tingling, burning, drying and/or

astringency sensation (page 5, lines 1-2 of the application). Therefore, regardless of the degree of “unpleasant mouthfeel,” the botanicals covered by the present invention are now specific and definite.

In addition, the person of ordinary skill in the art knows that one or more of the characteristics of unpleasant mouthfeel as specifically recited in the specification are associated with each of the specific botanicals listed in claim 1. For the moment, it is irrelevant to what degree any one person experiences the unpleasant mouthfeel and/or whether the consumer experiences one or more of the specific characteristics that make up unpleasant mouthfeel. What is important is that these specific botanicals are all known to elicit an unpleasant mouthfeel that has been confirmed in the laboratory, by focus groups, and by the actual experience of those of ordinary skill in the art.

The Office Action further states that the term “being effective to suppress the unpleasant mouthfeel” is also indefinite given that what may be effective suppression for one individual may not be sufficiently effective suppression for another individual. The Office Action is therefore suggesting that all persons must experience unpleasant mouthfeel in the same way and to the same degree and that the suppression of the unpleasant mouthfeel must be the same for each individual. Applicants disagree with this analysis.

By way of analogy, if Applicants’ claims were directed to a method of treating

a disease (e.g. diabetes), and a portion of the main claim indicated a method of treating diabetes comprising administering an effective amount of Compound X to a patient... . Following the present logic, this claim would be indefinite because what may be effective for the treatment of some patients may not be effective for treatment of other patients. If this were the law, virtually no pharmaceutical method of use would be patentable since it is well known pharmaceuticals are not effective for every patient or necessarily is the prescribed amount effective for every patient.

In the present case, it is known in the art that the botanicals identified in claim 1 have an unpleasant mouthfeel in that they exhibit any one or more of the characteristics of unpleasant mouthfeel identified at page 5, lines 1-2. The information provided in the present specification is more than sufficient to define unpleasant mouthfeel to the extent that one of ordinary skill in the art would not be familiar with this term. As Applicants have consistently maintained herein, the term "unpleasant mouthfeel" and more particularly, the term "mouthfeel" is standard in the art. Further evidence of this is set forth in the enclosed U.S. Patent Publication No. 20080226788 which is directed to LHG compositions for reducing the lingering bitter taste of steviol glycosides. The term "mouthfeel" appears throughout the published application including page 2, line 2, and paragraphs 0001, 0002, 0011, 0013, 0034, and 0043. While the published patent application contains numerous definitions of various terms used throughout the specification, there is no definition of "mouthfeel," despite the use of this term in generic claims 1 and 18. One therefore must conclude that the term "mouthfeel" does not raise any Section 112 issues in the art.

The remaining objections under 35 U.S.C. § 112 have been addressed by amendment to the claims. Specifically, the amount of the unpleasant mouthfeel suppressing agent has now been qualified as based on the amount of the hard boiled candy composition. The specific recitation of partially hydrogenated vegetable oils has now been separated from the recitation of specific saturated fats in the dependent claims. Accordingly, the claims as amended are deemed to meet all the requirements of 35 U.S.C. § 112 and withdrawal of the rejections of said claims is deemed proper and is respectfully requested.

Applicants' generic claims (claims 1, 28, and 55) have been amended to incorporate therein the subject matter of claim 2. Claim 2 has not been rejected over Carpenter alone or in combination with Seang as set forth on page 4 of the Office Action. Accordingly, the rejections under 35 U.S.C. § 102/103 as set forth on pages 4-6 of the Office Action are deemed overcome in light of the amendment to the claims. Claims 2-3 and 29-30 stand rejected as unpatentable over Carpenter (U.S. Patent No. 5,637,344) in view of Raymont (Australian Patent No. 71904/96). The same claims have been rejected as obvious over the same references further in view of Seang (WO 94/05260). The rejections are hereby traversed and reconsideration is respectfully requested.

The claims of the application as amended are directed to a hard boiled candy composition which contains a confectionery base, at least one of a specific group of botanicals, and a specified amount of one or more partially hydrogenated vegetable

oils or saturated fats capable of suppressing the unpleasant mouthfeel known to be associated with the specific botanicals recited. The claims are drafted to limit the unpleasant mouthfeel suppressing agent to only those specifically recited in the claims. Thus, in claim 1, the unpleasant mouthfeel suppressing agent employs the language "consisting essentially of" when identifying the particular agents. This portion of the claim is not therefore open-ended and other unpleasant mouthfeel suppressing agents in amounts known to suppress unpleasant mouthfeel are excluded from the claims.

Carpenter teaches making a hard boiled candy composition containing cocoa powder, alleged to be a botanical having an unpleasant mouthfeel. While cocoa powder may be considered to have an unpleasant mouthfeel if untreated, it is clear that the reference treats the particles of cocoa powder with air-jet milling to address the unpleasant mouthfeel problem. As indicated at column 2, beginning at line 37, the chocolate flavored hard candy composition is prepared in part by air-jet milling cocoa powder under conditions sufficient to produce particles having an average size of less than about 15 microns with generally rounded edges. To the extent that cocoa powder has an unpleasant mouthfeel, it is as the result of particles having jagged edges. The jagged edges irritate the tissues of the oral cavity causing a tingling sensation. As indicated in column 1, lines 42-49, typical cocoa powder has a rough surface and a sandpaper-like feel to the tongue. When viewed under a scanning electron microscope, the particles are typically larger than 15-25 microns. They also have an irregular, uneven shape with jagged or sharp edges which

account for its unacceptable textural sensation.

Carpenter solves this problem by air-jet milling cocoa powder under conditions sufficient to produce particles having an average particle size of less than about 15 microns and generally rounded edges (column 2, lines 37-39). Thus, Carpenter utilizes air-jet milling as the only or at least primary means of dealing with the unpleasant mouthfeel of typical cocoa powder.

The Office Action refers to column 6, beginning at line 58, to indicate that oil (a non-essential ingredient) may be used in the Carpenter composition to facilitate mixing of the cocoa powder and the amorphous candy mass. It is also stated to add to perceived richness to the final product and improve the texture thereof.

Once again, the present claims are directed to a hard boiled candy composition containing one or more of a select group of botanicals known to have an unpleasant mouthfeel. A single unpleasant mouthfeel suppressing agent in the form of partially hydrogenated vegetable oils or saturated fats is added to the hard boiled candy composition in an amount effective to suppress the unpleasant mouthfeel. The present invention does not employ any other agents or processes to deal with unpleasant mouthfeel.

The advantage of the present invention, especially with respect to Carpenter, is that the air-jet milling process of Carpenter is eliminated. No person of ordinary

skill in the art would look at Carpenter and to eliminate air-jet milling to deal with unpleasant mouthfeel. Quite to the contrary, the presence of oil is clearly optional and Carpenter makes it clear that air-jet milling is required for acceptable use of cocoa powder.

Raymont is stated to disclose a lozenge composition containing Echinacea. The addition of Raymont to Carpenter does not cure the deficiencies of the former reference. Applicants do not dispute that Raymont discloses the use of Echinacea nor that botanicals are generally known in the art. However, no one has taught or suggested the use of partially hydrogenated vegetable oils or saturated fats as the sole agent for suppressing unpleasant mouthfeel of the claimed botanicals. As previously indicated, Carpenter requires air-jet milling to deal with the problem. Combining this reference with Raymont which discloses Echinacea does not in any way provide guidance or motivation to the skilled artisan to deviate from the requirement of air-jet milling.

Applicants note that the same claims (claims 2-3 and 29-30) were rejected by the additional citation of Seang. Seang is stated to teach that lipids (oils and fats) were known for masking the bitter taste (i.e. unpleasant mouthfeel) of drugs. The Office Action concludes that it would have been obvious to the person of ordinary skill in the art that the partially hydrogenated vegetable oils or saturated fats in Applicants' recited range, as taught by Carpenter, will suppress the unpleasant mouthfeel of a botanical in a similar manner as the present invention. The rejection

is hereby traversed and reconsideration is respectfully requested.

Once again, the present invention is directed to use of a single unpleasant mouthfeel suppressing agent (partially hydrogenated vegetable oils or saturated fats) to address the problem of unpleasant mouthfeel in a hard boiled candy. Carpenter requires air-jet milling to transform cocoa powder from a rough, jagged texture to one which is smooth, having no unpleasant mouthfeel. Carpenter identifies “oil” as an optional ingredient to facilitate mixing the cocoa powder with the amorphous candy composition.

Seang teaches a liquid coating on certain drugs will mask the bitterness thereof. There is nothing in Seang to suggest a treatment for botanicals nor that Carpenter's air-jet milling process could be eliminated by using just an oil. The combination of Carpenter and Seang requires consideration of both disclosures and a rationale that incorporates both technologies to substantiate a rejection based on obviousness. One cannot arbitrarily eliminate what one reference teaches to substantiate an obviousness rejection. Carpenter teaches air-jet milling to address an unpleasant mouthfeel problem. Seang utilizes a lipid coating as a taste-masking agent. The proper reading of these references taken together is that one uses air-jet milling and one utilizes oil to create a product that does not have unpleasant mouthfeel. There is nothing in the combination of references to suggest that air-jet milling can be eliminated and yet unpleasant mouthfeel can be suppressed for the specific group of botanicals identified in Applicants' claims.

Accordingly, the rejections based on Carpenter, Seang and Raymont is improper and should be withdrawn. In view of the foregoing, Applicants submit that the present application is in condition for allowance and early passage to issue is therefore deemed proper and is respectfully requested.

It is believed that no fee is due in connection with this matter. However, if any fee is due, it should be charged to Deposit Account No. 23-0510.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Allen R. Kipnes", written over the printed name.

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